RALPH AND RUTH DICKINSON

IBLA 79-27 Decided February 15, 1979

Appeal from decision of the Eastern States Office, Bureau of Land Management, requiring payment of $6,400 to purchase land in Wisconsin as a Class 1 color of title claim. ES 16144.

Vacated and remanded.

1. Constitutional Law: Generally

   Under the United States Constitution, states have no power over disposition of Federal property.

2. Color or Claim of Title: Generally--Color or Claim of Title: Appraised Value

   Use of a formula, based solely on the longevity of an applicant's acquisition of title or possession, in determining the purchase price of a parcel of land under the Color of Title Act does not fulfill the Congressional mandate to consider and give full effect to the equities of the applicant. Each applicant's application and equities must be considered on its own merits.

3. Administrative Procedure: Generally--Appeals--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Failure to Appeal

   A notice of appeal must be filed within 30 days after appellant is served with the decision from which he is appealing. When a party does not appeal, the doctrine of administrative finality, the administrative equivalent of res judicata,

generally bars consideration of the same issue in a later appeal.

4. Color or Claim of Title: Generally--Color or Claim of Title: Appraised Value

Where an Act of Congress prescribed a purchase price for land to a certain group of claimants of land omitted from the original surveys, that Congressional determination of equities should be considered by the Bureau of Land Management in assessing the deduction for equities from the appraised value of land to be sold under the Color of Title Act.

APPEARANCES: Michael F. Dubis, Esq., Waterford, Wisconsin, for appellants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Ralph and Ruth Dickinson applied under the Color of Title Act, as amended, 43 U.S.C. § 1068 et seq. (1970), to purchase Lots 7, 8, 10, and 11, sec. 20, T. 39 N., R. 15 E., fourth principal meridian, Wisconsin, containing 105.95 acres on the shore of Halsey Lake. 1/

The lands were omitted from the original survey, and until sometime after 1973, 2/ appellants assert they believed they owned the lands in question via a chain of title stemming from an 1882 patent. In 1953 appellants paid $4,000 for 240 acres, including these lands. The land was largely unimproved at the time. Appellants have built a two bedroom house, a garage, a shed, a well, and approximately one-fourth mile of graveled access road on the land.

In August 1971 appellants received a letter from the Bureau of Land Management (BLM), informing them that "this office has scheduled a preliminary investigation and conditional survey of lands which may have been omitted from the original survey in Section 20, Township 39 North, Range 15 East, fourth principal meridian, Wisconsin." From the record it appears there was no further communication between appellants and BLM until November 1973. At that time appellants received a letter from the Eastern States Office which

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1/ Appellants originally sought Lots 9 and 14 also; however, the application was later amended to exclude those lots.
2/ In the statement of reasons, appellants assert that they "were informed orally that due to an erroneous government survey, approximately 105 acres of the 240 which they purchased were still in government ownership."

stated, in its entirety: "Enclosed for your information is a copy of the notice of the filing of a plat of survey of omitted lands in Florence County, Wisconsin." A notice of filing the plat of survey was enclosed. The plat was officially filed December 17, 1973.

On December 9, 1975, appellants' attorney wrote BLM asserting title to the land under the Act of August 24, 1954, 69 Stat. 789 (hereinafter the Act), and requesting assistance in resolving the matter. BLM responded by letter dated March 14, 1976, that under the Act an application for erroneously meandered lands in Wisconsin must be filed within 1 year from the date of the official filing of the plat of survey. As it was then more than 2 years from the date of filing, BLM suggested appellants file a color of title application.

Appellants filed a Class 1 color of title application. The land and application were studied, an appraisal made, and an equity report done. The land was appraised at $69,000. It was determined that appellants met the requirements of the Color of Title Act for a valid Class 1 claim. In setting the price appellants would be required to pay for the land, BLM considered regulation 43 CFR 2541.4(a), which states in part:

> [I]n determination of the price payable by the applicant, value resulting from improvements or development by the applicant or his predecessors in interest will be deducted from the appraised price, and consideration will be given to the equities of the applicant. In no case will the land be sold for less than $1.25 per acre. [Emphasis supplied.]

A formula adopted by the New Mexico State Office, BLM, allowing "deduction of the original acquisition cost and a percentage deduction for longevity of the exclusive, continuous, notorious possession of the land" (Equity Report), was used to arrive at the figure of $6,400. See Appendix A.

On August 25, 1978, the Eastern States Office decided appellants had established a preference right to purchase the land for $6,400. The decision set forth the requirements for doing so. The Act of August 24, 1954, was not mentioned in the decision. Appellants appealed on the ground that notice given under the Act "was insufficient and did not properly inform them of their rights," and the amount of payment should be $1.25 per acre, or $132.50. Appellants further amplified their reasons for appeal, alleging the notice of the filing of the resurvey was inadequate, objecting generally to the manner in which the appraisal was determined and the failure to fully consider the equities, but not showing any error in total amount, 3/

3/ It is not clear whether a copy of the appraisal was made available to appellants. This should have been done.

and citing a Wisconsin statute which they feel gives them a right to the lands.

[1] Appellants cite Wis. Stat. § 30.10(4)(b), which states in part:

> [I]n the case of a lake or stream erroneously meandered in the original U.S. government survey, the owner of title to lands adjoining the meandered lake or stream, as shown on such original survey, is conclusively presumed to own to the actual shore lines unless it is first established in a suit in equity, brought by the U.S. government for that purpose, that the government was in fact defrauded by such survey.

Appellants assert that this "seems to hold that the Dickinsons own the land * * * conclusively unless a suit is brought by the U.S. government alleging fraud." While the statute does purport to so hold, it is ineffective, under the Supremacy Clause of the United States Constitution, to give any rights in Federal land. Under our Federal system of government, States have no power over disposition of Federal property. U.S. CONST., art. VI, cl. 2; U.S. CONST., art. IV, § 3; Kleppe v. New Mexico, 426 U.S. 529 (1976); Bureau of Land Management v. Babcock, 32 IBLA 174, 84 I.D. 475 (1977); see also Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Camfield v. United States, 167 U.S. 518 (1897); McCulloch v. Maryland, 4 Wheat. 316, 17 U.S. 316 (1819).

[2] Both the Color of Title Act, 43 U.S.C. § 1068a (1970), and regulation 43 CFR 2541.4(a) quoted supra, require the Department to "consider and give full effect to the equities of any * * * applicant." It was correct for BLM to deduct the amount appellants paid for the land as one of the equitable factors. However, apart from that, BLM considered only the length of time of appellants' acquisition or possession of the land. We do not believe the use of a formula, based solely on the longevity of an applicant's claim fulfills this mandate. There are many other factors which should be considered in determining the equities of the applicant. These factors include whether the applicant and his grantors paid fair market value for the land, the degree of reasonableness of the applicant's belief good title to the land was acquired, 4/ the length of the chain of title,

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4/ For example, in reviewing the record here, we note that appellants submitted no abstract of title but only an abstract of an abstract prepared by the Florence County Abstract Company. Appellants' deed conveys the NE 1/4 and the E 1/2 of NW 1/4. There are some discrepancies in descriptions in earlier deeds which are not explained. However, appellant's deed is a warranty deed. These facts would be considered in weighing appellants' good faith.

how the errors relied upon by the applicant were caused, the payment of taxes on the land, and any other factors which in a spirit of fairness, a court of equity would recognize, A. F. Dantzler, A-31038 (May 12, 1970). The fact that it is difficult to assign a monetary value to such factors is not sufficient justification for the Department to abdicate its responsibility under the statute to consider each application on its individual merits. Because the State Office did not properly evaluate appellants' equities, the case must be remanded for reconsideration.

[3] The Act of August 24, 1954, supra, authorizes the Secretary to issue patents for lands bordering lakes and rivers in Wisconsin which were omitted from the original surveys where the land

> has been held in good faith and in peaceful, adverse possession by a person, or his predecessors in interest, who had been issued a patent prior to January 21, 1953, * * * at the same price per acre as that at which the land included in the original patent was purchased and upon the same terms and conditions. [Emphasis supplied.]

68 Stat. 789, 790. Section 2 of the Act provides: "Upon the filing of a plat of resurvey under section 1 of this Act, the Secretary shall give such notice as he finds appropriate by newspaper publication or otherwise of the opening of the lands to purchase under this Act." (Emphasis supplied.)

While discretionary as to the kind of notice to be given, the Act mandates some form of notice be given at the time the plat is filed that the lands are available for purchase under the Act. See Stickleman v. United States, 563 F.2d 413 (9th Cir. 1977). The possessor is required to apply to purchase the land during the 1-year period commencing with the official filing of the plat of resurvey, and during that time no patent may be issued to another for the land. This makes the possessor the only possible purchaser during this period, and the intended beneficiary of the notice provision.

Appellants were given no notice that the land was open to purchase. They were sent only a copy of the notice of filing of the resurvey which mentioned neither the Act itself nor that the land was open to purchase.

In a Staff Report, dated October 14, 1976, the Eastern States Office (ESO) noted:

> By the provisions of the Act of August 24, 1954, the Dickinsons should have been allowed to file an application for these erroneously meandered lands within one year of the plat filing date. (See 43 CFR 2545). However, the plat filing notice did not specify this

right and they were not otherwise advised of it by this office.

In his remarks on the request for an appraisal, the Acting Director, ESO, notes:

> Although this land is in the Nicolet National Forest, the applicants have a prior valid right to these lots which were described by an omitted survey. They were entitled to apply under the Act of August 24, 1954 (68 Stat. 789) to obtain the lots under the terms and conditions of the original patent, that is, for $1.25 an acre. The notice of plat filing prepared November 1, 1973, however, failed to afford them the opportunity to exercise their rights under that act.

The BLM letter of March 14, 1976, informed appellants that "applications pursuant to this act may no longer be accepted" for these lands. It went on to state that "a color-of-title application * * * may be acceptable." Under 43 CFR 4.410 appellants' had a right to appeal the decision that an application under the Act of August 24, 1954, supra, could not be filed. Fancher Bros., 33 IBLA 262 (1978). To do so would not have jeopardized appellants' right to file a color-of-title application if the appeal was unfavorable. A notice of appeal must be filed within 30 days after appellant is served with the decision from which he is appealing, 43 CFR 4.411. Appellants chose not to appeal the BLM decision. When a party does not appeal a BLM decision, the doctrine of administrative finality, the administrative equivalent of res judicata, generally bars consideration of the same issue in a later appeal. Wilfred Plomis, 35 IBLA 1 (1978).

Appellant is too late in raising the issue of lack of notice under the Act for us to entertain the contention in appellants' appeal that they are still entitled to purchase the land under the Act of August 24, 1954. However, this bar to acquiring title under that Act does not preclude consideration of the Congressional policy manifest in that Act and of the Bureau's lapses in giving the specific notice to the class of persons granted relief under the Act. It is evident that Congress weighed the equities of those persons affected by the erroneous surveys in Wisconsin and determined they should be allowed to purchase the land at the same price per acre as paid in the original patent (here $1.25 an acre). BLM should consider this Congressional determination of equities in assessing the deduction for equities from the appraised value of the land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the

decision appealed from is vacated and remanded for reconsideration in accordance with the views herein expressed.

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Joan B. Thompson
Administrative Judge

We concur:

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James L. Burski
Administrative Judge

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Edward W. Stuebing
Administrative Judge

APPENDIX A

The New Mexico approach is set out below.

Instruction Memorandum No. NMSO-78-24
Expires: 9/30/78

To: Division Chiefs & District Managers

From: State Director

Subject: Equities Considerations in Color-of-Title Cases

Instruction Memo NMSO-77-217 provides guidance as to items that should and should not be considered as equities in color-of-title cases. Certain equities are clearly defined and can be accurately measured as to their dollar value. Others are not so clearly defined or exactly measurable. This memo is to provide guidance that will insure a consistent and equitable approach in all cases. Equities difficult to measure and/or subject to the exercise of judgment will be placed in the following two categories:

Category 1

This equity is that which accrues to an individual who acquires and holds a parcel of land in good faith believing that he/she holds good title to the land. Such person is the object of relief afforded by the Act of December 22, 1928, as amended (67 Stat. 227; 43 U.S.C. § 1068, 1068a). This equity is based on the premise that the period of possession is akin to a lease where the lessee has acquired an interest in the land, i.e., a leasehold interest. The same principles apply as to the applicant with an interest evolving from occupancy, holding or tenure as vested rights arising from the period of possession and it will be credited to the applicant according to the length of time he/she (the applicant or those persons to whom he/she is related by consanguinity or affinity to a degree not greater than three) have held the land as per the following schedule:

Applicants time of possession-acquisition of color-of-title to date of application.	Equity allowance expressed as a per-centage of fair market value.
5 years or less	0%
5 years to 10 years	15%
10 years to 15 years	30%
15 years to 20 years	50%

20 years to 30 years	70%
30 years to 40 years	90%
More than 40 years	*100%

* Payment will be $1.25/acre.

Category 2

These equities are those that necessarily rest upon an exercise of judgmental considerations A. F. Dantzler, A-31038 (May 12, 1970). By their own definition, these equities are a matter of judgment. Unlimited application of such equities could result in wide fluctuations in the dollar amounts applied. This could, in turn, result in inequities between applicants and the application of relief not soundly based on policy and administrative and court decisions. The application of equities based on an exercise of judgmental considerations will, therefore, be held to a minimum and should not exceed 20% of the total amount of equities allowed. It is the responsibility of the Realty Specialist working the case to gather and confirm all facts relative to possible equities in the process of preparing the Land report. Preparation of the appraisal and the application of equities thereto will be the responsibility of the appraiser.

The Equity Report in this case included the following:

Equity Consideration

On items 5 and 7c, the applicants state that they purchased the property in March 1953, believing they had purchased 240 acres, for a purchase price of $4,000. Prorating the $4,000 purchase price over the 240 acres indicates an acquisition cost of $16.67 per acre. The indicated acquisition cost of the subject 105.95 acres would then be $1,766.

The case file indicates that the applicants could have exercised their rights to purchase the lands upon survey under other statutes if they had recognized the applicability of these statutes to their situation. However, the time limit had expired before they attempted to exercise these rights. Because of this factor, it is felt that the maximum suggested deduction for intangibles should be given.

Summary

Net Appraised Value			$69,000.00
Original Acq. Cost	$ 1,766.19		
Longevity (20-30 yrs. 70%)	48,300.00		
Total Tangible Equities		$50,066.19	
Intangible (25% of		12,516.55	

Tangible) 1/	
Total Deductions	62,582.74
Purchase Price	6,417.26
	6,400.00
	(Rounded)

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1/ Using 25% of tangibles results in allowance for intangibles being 20% of total deduction.

Editor's note; there is no page 268.